IN THE SUPERIOR COURT
OF
Gila County, State of Arizona

10/29/2019
HON. RANDALL WARNER V GUADIANA
Visiting Judge Judicial Assistant

THOMAS P. MORRISSEY, individually, Plaintiffs, **vs.** **LOGAN STAN GARNER, individually and as Chair of Unite Payson; KIM CHITTICK, individually and as Treasurer of Unite Payson; UNITE PAYSON, an Arizona political committee, SADIE JO BINGHAM, in her official capacity as Gila County Recorder; TOMMIE MARTIN, in her official capacity as Gila County Supervisor; TIM R. HUMPHREY, in his official capacity as Gila County Supervisor; WOODY CLINE, in his official capacity as Gila County Supervisor; SILVIA SMITH, in her official capacity as Payson Town Clerk; THOMAS P. MORRISSEY, in his official capacity as Payson Mayor, JIM FERRIS, in his official capacity as Payson Councilmember, CHRIS HIGGINS, in his official capacity as Payson Councilmember, STEVE L. SMITH, in his official capacity as Payson Councilmember, JANELL STERNER, in her official capacity as Payson Councilmember, SUZY TUBBS-AVAKIAN, in her official capacity as Payson Councilmember, BARBARA UNDERWOOD, in her official capacity as Payson Councilmember, and TOWN OF PAYSON, ARIZONA, a public entity,** Defendant.	**CV201900287**

RULING ON UNDER ADVISEMENT ACTION

Plaintiff Thomas Morrissey, the Mayor of the Town of Payson, filed this lawsuit to challenge a recall election. Defendant Unite Payson (with related Defendants Garner and Chittick), filed a Motion to Dismiss, and Defendants Garner and Chittick filed a Counterclaim/Cross-Claim. At a hearing on

October 28, 2019, the court took evidence and heard argument. It makes the following findings and conclusions.

I. FINDINGS.

A. Background.

Thomas Morrissey was elected Mayor of Payson in 2018. Under the Payson Town Code, a nonpartisan primary election is held for mayor and, if no candidate receives a majority, the two candidates with the most votes compete in the "general or runoff election." *See* Payson Town Code § 30.07(A)(3). But if one candidate receives a majority at the primary election, the candidate is declared elected as of the date of the general election and no further election is held. *See* Payson Town Code § 30.07(A)(1). Morrissey received 53.11% of the vote in the primary election on August 28, 2018, and so was declared elected as of the general election.

Unite Payson initiated a recall of Mayor Morrissey in 2019. The Town Clerk researched the issue and determined that 770 signatures were needed to force a recall election under Arizona law. That number is 25% of the votes for mayor in the 2002 general election, which was the last time a general election for mayor was necessary in Payson. Under Arizona's Constitution, the number of signatures needed to force a recall is 25% "of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer." Ariz. Const. Art. VIII, Pt. 1, § 1.

Unite Payson collected and submitted 970 signatures. The Town Clerk invalidated 40 signatures and submitted the remaining 930 to the County Recorder. The County Recorder invalidated 109, leaving 821 valid signatures. Because Unite Payson had more than 770 signatures, the Town Clerk called a recall election for March 10, 2020.

Mayor Morrissey filed this special action and injunctive lawsuit to challenge the recall election on two grounds. First, he argues that a number of petition sheets must be invalidated because one or more electors on them did not write their own addresses in violation of A.R.S. § 19-205(A). *See Parker v. City of Tucson*, 233 Ariz. 422, 438, 314 P.3d 100, 116 (App. 2013) (entire signature sheet is invalidated if elector did not print their own address and the circulator's affidavit says they did). Second, he argues that the number of signatures needed to force a recall election is not 770, but 1,255. The latter is 25% of the votes cast for mayor in the 2018 primary election. Mayor Morrissey argues that, because no general election was held in 2018, the number of signatures needed should be measured by the election in which he was elected.

Defendants Garner and Chittick filed a Counterclaim/Cross-Claim seeking to rehabilitate invalidated signatures.

B. Findings On Mayor Morrissey's Claim.

At the evidentiary hearing, Mayor Morrissey proved that a number of electors did not write their own addresses. Several of those had someone write their address for them due to a physical infirmity. Three did not have that excuse. They are: sheet 7, line 14; sheet 32, line 5; and sheet 32, line 6. There are 15 signatures on sheet 7 and 5 signatures on sheet 32.

The legal consequence of these facts is discussed below.

C. Findings on The Counterclaim/Cross-Claim.

At the evidentiary hearing, Defendants Garner and Chittick sought to rehabilitate a number of signatures invalidated by the Town Clerk or the County Recorder. On these issues, the court finds as follows.

The signature on sheet 77, line 8 was invalidated because the date was illegible. The court finds the date of August 30, 2019 to be legible.

Three signatures were invalidated because the signature did not match the voter registration signature: sheet 37, line 1; sheet 4, line 6; and sheet 82, line 11. The court finds each of these was properly signed by the elector.

A number of signatures were invalidated because they have a "Payson" address but are not within Payson's town limits. The court finds that these signers did not reside in the Town of Payson and so are not qualified electors.

39 signatures were invalidated because they contained a day and a month but no year. The recall petitions were only circulated in 2019. Based on that and other signatures on the same sheet, those 39 signatures were all made in 2019.

The legal consequence of these facts is discussed below.

II. LEGAL CONCLUSIONS: SIGNATURE CHALLENGES.

A. Mayor Morrissey's Signatures Challenge Is Not A Valid Challenge Under A.R.S. § 19-208.04.

Mayor Morrissey seeks to invalidate petition sheets because one or more of the electors on those sheets did not write their own address. Under the *Parker* case, if a circulator states in the affidavit that all electors on a sheet wrote their own address, and some did not, the affidavit is false and the entire sheet is invalidated. *Parker*, 233 Ariz. at 438, 314 P.3d at 116. As discussed above, the court finds that two petition sheets totaling 20 signatures contained addresses written by someone other than the elector. Thus, if Mayor Morrissey can assert this claim, these 20 additional signatures are invalid.

This number does not include petition sheets on which electors had someone else write their address due to a physical infirmity. Arizona law allows this, so signatures cannot be disqualified on this basis. *See* A.R.S. § 19-115(B); A.R.S. § 19-206(B).

Relying on A.R.S. § 19-208.04(B), Unite Payson argues that Mayor Morrissey may not assert this challenge under Arizona law. That statute says:

> If an elector wishes to challenge the number of signatures certified by the county recorder under the provisions of section 19-208.02, he shall, within ten calendar days after the receiving officer has notified the governor and

> the county recorders of the number of certified signatures received by him, commence an action in the superior court for a determination thereon. The action shall be advanced on the calendar and heard and decided by the court as soon as possible. Either party may appeal to the supreme court within ten calendar days after judgment.

A.R.S. § 19-208.04(B). The Supreme Court recently held that this provision is the exclusive basis on which an elector may challenge petitions. *See Morales v. Archibald*, 246 Ariz. 398, 401, 439 P.3d 1179, 1182 (2019). Under this provision, an elector may only challenge signatures for reasons the County Recorder could have disqualified them under A.R.S. § 19-208.02. So the question is: Could the County Recorder have disqualified signatures on the ground Mayor Morrissey alleges? A close reading of the relevant statutes shows that the County Recorder could not.

A.R.S. § 19-208.02(A) requires a county recorder to determine the number of petition signatures that must be disqualified for the reasons set forth in A.R.S. § 19-121.02(A). A.R.S. § 19-121.02(A), in turn, lists several reasons for disqualifying signatures, only one of which arguably applies here: "For the same reasons any signatures or entire petition sheets could have been removed by the secretary of state pursuant to § 19-121.01, subsection A, paragraph 1 or 3." A.R.S. § 19-121.02(A)(11).

So subsections (A)(1) and (A)(3) of A.R.S. § 19-121.01 must be examined. Nothing in subsection (A)(1) arguably applies here. The only part of subsection (A)(3) that could apply is (A)(3)(f), which requires invalidating signatures if "the ***petition circulator*** has printed the elector's first and last names or other information in violation of § 19-112." (Emphasis added.)

This is similar to what Mayor Morrissey proved here, but not the same. He proved that some electors who signed petitions did not write their own addresses. This is a violation of Arizona law. *See* A.R.S. § 19-205(A) ("the elector so signing shall write, in the appropriate spaces following the signature, his residence address"). But A.R.S. § 19-121.01(A)(3)(f) does not allow disqualifying a signature on that basis. That provision only applies if "the petition circulator" prints the elector's name or other information, not if someone else like a spouse or a friend does. In other words, there is a legal requirement that electors write their own addresses, but no legal redress if someone else does.

It is peculiar that the statutes impose a requirement on petition signatures but do not allow a county recorder to invalidate them on that basis. But that is what the statute's plain language says and the court is required to follow it. Mayor Morrissey's signature challenge does not fall under A.R.S. § 19-121(A)(3)(f), so it is not a valid challenge under A.R.S. § 19-208.04(B).

B. <u>Mr. Garner and Ms. Chittick Can Rehabilitate Signatures</u>.

Mayor Morrissey argues that the Counterclaim/Cross-Claim is an untimely signature challenge. A.R.S. § 19-208.04(B) requires that a legal challenge to signatures be filed in superior court within 10 calendar days after notification. Thus, had Mr. Garner and Ms. Chittick filed their own lawsuit to challenge disqualified signatures, they would have had to comply with the 10-day requirement. But A.R.S. § 19-208.04(B) does not preclude them from rehabilitating signatures as a defense to Mayor Morrissey's challenge.

On the merits, the court makes the following legal conclusions. First, 4 signatures were rehabilitated based on the court's findings above.

Second, signatures that include a day and month but no year are invalid. A.R.S. § 19-121.02(A)(2) required the County Recorder to invalidate signatures if "[n]o date of signing is provided." A day and a month are not a complete date. Without a year, there is no date.

Mr. Garner and Ms. Chittick point out that the date was obvious given that petitions were only circulated in 2019. They also point out that, according to the Secretary of State's handbook, a date and month with no year is sufficient for an initiative or referendum petition. But the statutes do not require or authorize the County Recorder to infer the correct date when a complete date is not written. Although it is obvious here—there is no question the signatures were made in 2019—it will not be obvious in all cases. The better interpretation of A.R.S. § 19-121.02(A)(3) is that a "date of signing" means a complete date. *See also* A.R.S. § 19-201.01 ("the constitutional and statutory requirements for recall be strictly construed and that persons using the recall process strictly comply with those constitutional and statutory requirements").

Finally, Unite Payson argues that people with a Payson address may sign petitions, and their signatures should not be invalidated if their address turns out not to be within the Town limits. The fact that the Post Office allows people outside Town limits to use a "Payson" address does not make them qualified electors of the Town of Payson. *See* Ariz. Const. Art. VIII, pt. 1, § 1 (public officer subject to recall by qualified electors of the district); A.R.S. § 16-121(defining "qualified elector"). If someone does not live within the Town limits, they are not a qualified elector, not eligible to vote in Town elections, and may not sign recall petitions for Town mayor.

C. Number of Valid Signatures.

Based on the above, Mayor Morrissey has not invalidated any additional signatures and Mr. Garner and Ms. Chittick have rehabilitated four. Thus, the total number of valid signatures is 825.

III. LEGAL CONCLUSIONS: NUMBER OF SIGNATURES REQUIRED.

A. Mayor Morrissey Can Challenge the Number Of Signatures Required By Special Action.

In addition to challenging the number of valid signatures, Mayor Morrissey challenges the number of signatures required to force a recall election under the Constitution. He argues that the Town Clerk should have used the 2018 primary election rather than the 2002 general election to determine the 25% required to force a recall election. Unite Payson argues that Mayor Morrissey cannot bring this challenge because it is not authorized by A.R.S. § 19-208.04(B).

A.R.S. § 19-208.04(B) governs challenges to recall petitions. As the Supreme Court held in *Morales*, only petition challenges authorized by A.R.S. § 19-208.04(B) may be asserted in court. 246 Ariz. at 401, 439 P.3d at 1182. But that statute does not preclude the target of a recall from challenging its legality, which Mayor Morrissey may do by way of special action.

Article 6, Section 18 of Arizona's Constitution authorizes the court to issue writs of mandamus, certiorari, and prohibition. Under the Rules of Procedure for Special Actions, a special action is used provide relief that previously was obtained by writ of prohibition, mandamus, or certiorari. Ariz. R. P. Spec. Act. 1(a). A special action may be brought where a public officer has proceeded in excess of legal authority, and a "person who previously could institute an application for a writ of mandamus, prohibition, or certiorari may institute proceedings for a special action." Ariz. R. P. Spec. Act. 2(a)(1), 3(b).

That is what Mayor Morrissey seeks. He alleges that the Town Clerk exceeded her legal authority by incorrectly interpreting the Constitution's 25% requirement. He seeks an order prohibiting the recall election from going forward. Were there no A.R.S. § 19-208.04(B), Mayor Morrissey could clearly do this under the special action rules, so the question is whether the statute precludes that remedy.

It does not. A.R.S. § 19-208.04(B) addresses challenges to signatures, and *Morales* holds that an elector may only assert petition challenges that are authorized by the statute. 246 Ariz. at 401, 439 P.3d at 1182. But nothing in the statute suggests it precludes the target of a recall election from challenging its legality.

By all accounts, the Town Clerk here acted in good faith and did everything reasonable to determine the right number of signatures required under the Constitution. But imagine some other town clerk decided only 10 signatures were needed to force a recall election. Or imagine a recall election was called without any petitions having been filed at all. Under United Payson's interpretation, A.R.S. § 19-208.04(B) would bar any legal challenge by the target of the recall election. Nothing in the statute—which, by its terms, is designed to authorize petition challenges—suggests it was intended to immunize recall elections from any other legal challenge by the target of the recall.

A recall election may only be called if the requirements of Article VIII, Part 1, Section 1 of the Constitution are met. If a recall election goes forward based on fewer signatures than the Constitution requires, it is an unconstitutional election despite the Town Clerk's and Unite Payson's good faith. A.R.S. § 19-208.04(B) cannot be interpreted to preclude Mayor Morrissey from challenging the election on that basis.

B. <u>The Number of Signatures Required To Force A Recall Is Measured By The August 2018 Election</u>.

Turning to the merits, Article VIII, Part 1, Section 1 of the Constitution states:

> Every public officer in the state of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole state. Such number of said electors as shall equal ***twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer***, may by petition, which shall be known as a recall petition, demand his recall.

(Emphasis added.) *See also* A.R.S. § 19-201(A). The Constitution must be interpreted according to its plain meaning when possible. *US West Communications, Inc. v. Arizona Corp. Com'n*, 201 Ariz. 242, 258, 34 P.3d 351, 354 (2001). But here the plain meaning yields no answer because there was no "last preceding general election." The last general election was 17 years ago, and the preceding election was the 2018 primary. So, as between the two, which election best fits the meaning of "last preceding general election" as contemplated by the Constitution?

The goal of interpreting a constitutional provision is to effectuate its intent as expressed in its language, while remaining true to the objectives it was meant to accomplish. *Saban Rent-a-Car LLC v. Arizona Department of Revenue*, 246 Ariz. 89, 95, 434 P.3d 1168, 1174 (2019). The purpose of Article VIII, Part 1, Section 1 is to tie the number of signatures needed to force a recall election to the size of the electorate. In a large election like one for governor, a large number of signatures is needed; in a smaller election like that for Payson's mayor, a smaller number of signatures is needed. The provision does this by measuring the number of votes needed by the votes cast at the "last preceding general election" for that office.

The term "preceding" is important. The Constitution could have said the "last general election." If it did, the 2002 general election would be the right one to use because it was the last general election. But the word "preceding" suggests temporal proximity, and that word cannot be ignored. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568, 432 P.3d 925, 927 (2019) ("A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous."). "Preceding" implies something "immediately before in time or in place." *See* Merriam-Webster's Collegiate Dictionary (10th ed. 2000); www.merriam-webster.com/dictionary/preceding. This temporal proximity is necessary to effectuate the purpose of measuring the number of required signatures by the present size of the electorate. Without it, the number of signatures needed could be measured by the electorate in 2002, 1992, or 1982, when it was much different from what it is now.

It is true that, under Payson's Town Code, the August 2018 election was called a primary election, not a general election. But its nomenclature is less important than the function that election served, which was to elect the Mayor. The Town Code could have called the August election a "general election" and the November election a "runoff election" because the August election decides who will be mayor unless no one gets a majority. Indeed, when a candidate gets a majority, they are "declared to be elected . . . as of the date of the general election."

The "last preceding general election" contemplated by the Constitution appears to be one that follows a partisan primary, as happens in statewide elections. *See, e.g., Kyle v. Daniels*, 198 Ariz. 304, 306, 9 P.3d 1043, 1045 (2000) ("the primary election . . . is a competition for the party's nomination, no more, no less, and does not elect a person to office but merely determines the candidate who will run for the office in the general election"). Payson's primary is different, and Article VIII, Part 1, Section 1 does not appear to have considered "top two" elections like it, which are the final election unless no candidate receives a majority.

The August 2018 primary election is not a perfect fit with the term "last preceding general election" in Article VIII, Part 1, Section 1. But it is a better fit than the 2002 election. It is more consistent with the Constitution's purpose of measuring the number of signatures needed to call a recall

by the present size of the electorate. And an election from 17 years ago cannot reasonably be considered "preceding."

As a matter of law, the number of signatures required to force a recall election is 1,225, which is more than the 825 valid signatures Unite Payson submitted. For that reason, the relief Mayor Morrissey requests must be granted and the recall election must be enjoined.

IV. ORDERS.

Based on the foregoing,

IT IS ORDERED denying the Motion to Dismiss.

IT IS FURTHER ORDERED granting the relief requested, and enjoining the recall election set for March 10, 2020.

This minute entry disposes of all outstanding claims and issues in this case. To facilitate an accelerated appeal, and because no further matters remain pending, the court signs this minute entry as a final judgment entered pursuant to Ariz. R. Civ. P. 54(c).

Randall Warner
Judge of the Superior Court

10/29/19
Date

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